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PRIVACY, FAMILY AUTONOMY, AND THE MALTREATED CHILD

JUDITH G. McMULLEN*

INTRODUCTION

This article examines the concepts of family autonomy and family privacy as they have developed in American law. Attempts to accommodate family autonomy and privacy interests have significantly compromised the protection of our children, and this article will demonstrate that privacy interests have traditionally served as justifications for leaving many maltreated children unprotected. Two fundamental assumptions provide the basis for the importance of family autonomy and privacy: (1) that privacy strengthens families, and (2) that parents will act in the best interests of their children. However, this article will illustrate that these assumptions are not true in many instances, and are especially suspect in the case of families where children are maltreated. This article concludes that we should not sacrifice the healthy development of a significant number of children to achieve a society that respects the privacy of individuals and the autonomy of families. Rather, we should acknowledge that there may be approaches, such as mandatory educational programs or community-based support centers, that respect individual privacy and preserve family autonomy while meeting the needs of children.

I. FAMILY AUTONOMY IN AMERICAN LAW

A. Definitional Issues

It must be acknowledged that it is difficult to define many of the terms used in this article. The terms "privacy" and "family autonomy" are notoriously ill-defined and have different meanings in different contexts. Nor do the terms "family" and "child maltreatment" have agreed-upon definitions. However, for purposes of this article, broad definitions of the terms will be used.¹ For the purposes of this discussion, the definition of "privacy" of-

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¹. "'Family' will be used to mean a discrete group within the horde." MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 3 (1981). "Child maltreatment" will be used
ferred by Julie C. Innes, a philosopher and author of *Privacy, Intimacy, and Isolation*, shall be used: "[P]rivacy is the state of an individual . . . having control over a realm of intimacy, which contains her decisions about intimate access to herself (including intimate informational access) and her decisions about her own intimate actions." The expression "family autonomy," however, will refer to a situation where the family itself controls access to itself and the decisions of its members.

Additionally, "family autonomy" will refer to the assumption that a family unit, however defined, should be governed by the private decisions of some or all of its members. The decisions will not be subject to scrutiny or interference from outside authorities unless there is a compelling reason which is itself discernible without intrusion. Thus, family autonomy will be considered a derivative of individual privacy because a family is a group of individuals, each possessing the right of privacy. These privacy rights are meaningless unless a specific context exists where those rights are properly exercised. The family is that context. In other words, family autonomy is the state of separateness from societal intervention that occurs when adult family members are allowed to freely exercise their own rights of privacy in family decision-making.

Most judicial opinions dealing with privacy concern issues such as sexual relations and procreation. However, family autonomy arises in a number of other contexts, such as parental decisions regarding education and medical care for children. Arguments favoring family autonomy may be justified by theories that claim that parents have a right to the care and custody of their children; that children have a right to be left alone in an intact family; or that strong, private families must be protected because of their value to society. Some scholars claim that cases that deal with an individual's right to privacy are limited to individuals within the context of traditional marriages and families, and thus might more properly be understood as expansions of the doctrine of family autonomy. Considerable

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3. Id. at 56.
6. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 231-32 (1972) (Amish family's decision not to send children to high school was protected based on the interests of the Amish community).
overlap exists between the vagaries of privacy and family autonomy as the terms are used in law.

One of the problems in establishing reasonable limits on individual privacy or family autonomy is that the terms are not used consistently. Legal and philosophical accounts of privacy differ as to whether the essence is the individual’s accessibility to outside scrutiny or interference, or the individual’s control over intimate matters concerning herself. There is also a lack of agreement as to why privacy is a valued right at all. It is sometimes claimed that privacy has some intrinsic value because it leads to desirable consequences, but value has also been attributed to privacy because it embodies respect for inviolate individuals.

In the context of parent-child relations, we could characterize family autonomy as respect for the control parents have over intimate decisions, such as decisions about the care of their children. In the same context, we could characterize privacy in the sense of both the parents’ and the child’s isolation from outside scrutiny. For example, in some ways a parent’s privacy is defined by decisions made in which outsiders have no right to intervene, such as a decision to send a child to his room. Family privacy also may mean that although a parent’s chosen actions may be visible, as in the case of spanking a child at the supermarket, no outsider has the right to usurp that parental control. The values recognized in these characterizations of legitimate family autonomy include presumptions of desirable consequences to parents, children, and society, as well as reverence for the inviolate individual. Thus, all of the elements arguably constituting privacy are present in the family context.

Juxtaposed against the concepts of individual privacy and family autonomy is the notion of justifiable intervention into the workings of the family. This paper specifically focuses on family intervention for the ostensible purpose of advancing the welfare of children within the family. There are different types of intervention, and potentially different parties who may implement them. The American system of family intervention is a combi-

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8. INNESS, supra note 2, at 19. Inness identifies the first account as representative of tort law’s concept of privacy and the second account as representative of the constitutional law definition of privacy. Because the state’s right to interfere in a parent-child relationship is usually characterized as a constitutional issue, my working definition of privacy focuses on control.

9. Cf. Jane Rutherford, Beyond Individual Privacy: A New Theory of Family Rights, 39 U. FLA. L. REV. 627, 642 (1987) (Rutherford points out that there is not even agreement as to what should be included within the right of privacy; assessing the value of privacy is difficult if we do not know what it entails).

10. Such desirable consequences may include safety, encouragement of free discourse, and promotion of interpersonal relationships. INNESS, supra note 2, at 18.

11. On a society-wide basis, this is related to a respect for diversity.
nation of legal and societal interventions with periodic shifts in their dominance. Legal intervention includes actions taken by police, lawyers, and judges under the auspices of the criminal court system or the juvenile court system.\(^\text{12}\) The criminal system focuses on parental responsibility, accountability, and punishment, while the juvenile court system, at least in theory, looks to protect the child in the best way possible.

Other agents of society may also intervene in families. Social workers, mental health professionals, teachers, or other concerned citizens can act in family crisis situations without necessarily invoking an official legal process. This type of intervention is referred to as societal intervention.

### B. Historical Developments

An understanding of the current approach to family autonomy requires some examination of its evolution in the law and society of the United States. Individual privacy and family autonomy have followed, and continue to follow, parallel lines of development. As one has increased, so too has the other, largely because of changes within the structure of the American family itself. As expectations about the role of family have changed, so have the relationships between husbands and wives, and parents and children.

To examine why American law and policy have been so fiercely protective of privacy and autonomy within the family, this section will briefly outline some of the significant changes families in the United States have undergone since the mid-eighteenth century. The parallel development of laws and policies governing intervention between parents and their children will also be discussed. It will be argued that privacy has been treated as an essential pre-condition for the family to fulfill its primary responsibilities to society at large, and also for the development of autonomous individuals.

Family autonomy represented, at most times in American history, the most efficient route to the family's fulfillment of its cultural functions. Initially, this was based upon the perception of family as the naturally effective servant of an orderly society. This perception is indicative of a presumption that parents can be trusted to act in the best interests of their children. Eventually, family privacy was seen as a right of autonomous adult family members, as well as a logical result of the family's retreat into the private rather than the public world. This is related to a second presumption sup-

\(^{12}\) It could also occur within the family court system which uses “the best interests of the child” as its guiding principle. However, family court interventions are typically undertaken only when the court has ongoing jurisdiction over some related family matter, for example, a divorce. Since this article is focused on interventions due to parental action or inaction, family court intervention will not be specifically discussed.
porting society's reverence for family autonomy: that privacy is good for families and, in particular, enables families to carry out their role of producing well-adjusted, autonomous individuals.

1. The Colonial Family

The pre-colonial and colonial family was inextricably linked to society at large. "Through much of the colonial period, most colonists conceived of the family as part of a hierarchically organized, interdependent society rather than as a separate and distinct sphere of experience. Households were tightly bound to the rest of society by taut strings of reciprocity." While common visions of an extended family residing in one household are probably inaccurate, ties between family and community were a vital part of colonial life. Female relatives and friends attended women during pregnancy and childbirth, and many household and agricultural tasks were performed in cooperation with other members of the community.

Just as the society at large was hierarchically organized, so too was the colonial family, with the father as the top authority. In theory, the mother had less authority over her children; however, in practice she had a great deal of influence, especially over her daughters. Parental rights were viewed as interrelated with the duty to support, properly educate, and encourage children to be good members of society. The responsibility to produce good citizens was taken seriously not only by fathers, but by mothers as well. As one woman wrote in 1755: "[E]ven we the weaker Sex may be Serviceable to the Society where we live and to the world in general by bringing up our Children in Such a manner as to abhor Vice and act Virtuously from a principle early inculcated which is the most likely to be lasting."

Most mothers and fathers took their duty to shape their children into productive members of society seriously, and prevailing wisdom dictated that the family was the most natural and effective place for this shaping to occur. However, society continued to guard its right to function

20. "Church and school, though valued for their contributions, were subservient to the family in turning unruly, immature children into dutiful subjects." Children and Youth in
smoothly, untroubled by criminal or nonproductive members. Where families failed, society stepped in:

The father (and on his death, the mother) is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the courts of justice may, in their sound discretion, and when the morals, or safety, or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere. . . .

Child protection efforts during this period appear to have been largely motivated by society's perceived interest in protecting itself from neglected or abused children. It was feared that these children would become paupers or criminals who would become a burden on society and a threat to the social order. Thus, the purpose of out-of-home placement was not to serve the child's needs, but rather to deal with the child in a socially beneficial manner. Some children were placed in poorhouses, where they were mixed with various types of troubled adults. Most colonial children who were removed from their parents' custody entered into apprenticeships, sometimes without parental consent. "While the colonists were concerned about the welfare of dependent and orphaned children, the early records show that the desire or necessity for economy overrode all other considerations." Even later efforts to protect children from unhealthy or excessive labor, or from the perils of almshouses filled with criminal or mentally ill adults, were advanced chiefly to benefit society as a whole.

Society's right to ensure a certain minimum level of social compliance appears to have been taken for granted. The state had the power to substitute itself in the parental role to protect society's own interests where (as the Supreme Court stated years later) "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."

Despite claims of society's right to interfere in a family, it was rarely asserted that a right to assess the appropriateness of parental punishments existed. It is more accurate to view appropriate court intervention in the eighteenth and nineteenth centuries as neglect cases where the parents had

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21. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 203-05 (11th ed. 1867), reprinted in CHILDREN AND YOUTH, supra note 20, at 364.
22. Thomas, supra note 16, at 301.
23. Id.
24. CHILDREN AND YOUTH, supra note 20, at 64-71.
failed to provide appropriate discipline, education, or moral guidance. Extreme family poverty, with the consequent failure to provide the necessities of life for children, was also considered a legitimate ground for child removal. Society rarely intervened because a child had been punished too harshly. "The courts reasoned that an orderly society depended on parents having discretion in disciplining within the home in order to maintain domestic harmony and family government." Theoretically, only physical punishment which caused severe and permanent injury to the child, or was motivated by malice rather than disciplinary intent, could be prosecuted successfully under criminal statutes. However, there is a paucity of these types of reported cases as well.

Early American judicial decisions gave the benefit of the doubt to parents in disciplinary and other family matters. These decisions stressed that deference to parental authority was essential to preserving the social order and producing productive and law abiding citizens. Apparently, it was assumed that parents would automatically and naturally discern the best interests of their children.

2. The Nineteenth-Century Family

Perhaps the most obvious social changes of the nineteenth century were caused by the Industrial Revolution. Production moved to the private sector, and the family became more autonomous and private as a consequence. Adults and children flocked to the new factory jobs. Heretofore unconsidered issues arose, particularly with respect to children, as society evaluated working conditions, wages, total working hours, and the general acceptability of child labor. Workers increasingly left home to pursue economic interests, and personal qualities such as independence, ambition, and autonomy became highly valued.

As social reforms began to protect children and other workers, the American idealized image of the independent individual continued to develop. Courts adjusted their reasoning to gradually create a rhetoric of family autonomy and "parental rights" which could be limited only by significant state interests. One legitimate state interest was the assurance of some minimum level of welfare for the child. Increasingly, families resisted community authority, opting instead for a more self-interested autonomy.

A series of interconnected changes marked the crucial transition of the family from a public to a private institution. The economic

27. Id. at 305.
28. Most of the ideas in this section, especially the introduction, must be attributed to GROSSBERG, supra note 13.
moorings of the household shifted from production toward consumption. Generational influences on family formation declined. New fertility patterns resulted in declining family size. A new domestic egalitarianism emerged to challenge patriarchy. Other alterations included companionate marital practices and contractual notions of spousal relations, an elevation of childhood and motherhood to favored status within the home, an emphasis on domestic intimacy as a counterweight to marketplace competition, and a more clearly defined use of private property as the major source of domestic autonomy. 29

These complex social developments led to the rejection of patriarchal authority and governmental activism. The home became increasingly isolated from the rest of society. "Republican political ideology's reinforcement of individual worth and personal identity, the evangelical emphasis on equality before God, and the individual competitiveness and acquisitiveness unleashed by market capitalism fueled demands for greater autonomy in all relations, even domestic ones." 30

Social attitudes towards children and child-rearing also underwent enormous changes. "During the nineteenth century, children came to be seen more explicitly than ever as vulnerable, malleable charges with a special innocence and with particular needs, talents, and characters. Consequently, authoritarian child rearing and hierarchical relations succumbed to greater permissiveness, intimacy, and character building." 31 However, the social implications of proper child-rearing remained important. "Though other institutions such as the common school and the church shared its duties, molding the nation's young into virtuous republicans and competent burghers became more clearly the primary responsibility of the family." 32

Although many of the changes in the family and its treatment by law and society were due to different expectations and practices with respect to marriage, the social and economic factors which affected the family had specific effects on the parent-child relationship as well.

Although there has been much speculation about the implications of the fact that the principal tie between most modern couples is emotional rather than economic, it has been less remarked that the same is true for the modern parent-child relationship. Children have ceased to have the economic value they once had as helpers on the farm, earners in industry or hedges against helpless old age. In a purely economic sense they are liabilities rather than assets. That

29. Id. at 6.
30. Id. at 7.
31. Id. at 8.
32. Id.
people keep having them anyway despite the cost, is, in the view of the Carnegie Council on Children, a "revolutionary" change. Philippe Aries, the celebrated and controversial historian of childhood, sees the modern parent-child relationship, like the couple relationship, as simultaneously intense and unstable to an historically unprecedented degree.\textsuperscript{33}

Thus, the many forces shaping American law and political structure in general also shaped a distinctly American, and still evolving, law of the family. In general, the judiciary encouraged individual responsibility for policy-making. Law adopted the notion of co-existing public and private spheres "which identified private will with the natural order and state action as artificial intervention."\textsuperscript{34} Equally important in the development of family law was the notion that this private sphere was inhabited by autonomous individuals. "The development of separate legal entities within the republican family thus was [one of the] . . . major defining element[s] of nineteenth century family law."\textsuperscript{35}

The family was simultaneously viewed as an autonomous, self-regulating world unto itself, and as a collection of independent and self-interested individuals. The Anglo-American tradition had long relied on natural parental inclinations and affections as the basic safety mechanism protecting family relations, with public surveillance providing some back-up in unusual circumstances. Now, outside intervention was not only less frequent, it was viewed as contrary to the proper separation of the public and private spheres. There was an unacknowledged tension between treating the family as completely autonomous and assuming that individual members of the family would invariably have their needs met and their conflicts with each other resolved without recourse to extra-family resources.\textsuperscript{36}

Many historians and sociologists perceive great changes in the structure and purpose of the family from early modern times to the present. Early notions of marriage and family focused on the expectations of the larger kinship groups as well as on the role of the family in raising productive citizens for the commonwealth. The marital relationship was essentially a bargained-for contract, with its most significant terms and expectations frequently being economic provisions. By the beginning of the nineteenth century, there was a greater expectation of individual emotional fulfillment within marriage and family. This ideal of independent and self-interested

\textsuperscript{33} GLENDON, supra note 1, at 18.
\textsuperscript{34} GROSSBERG, supra note 13, at 14.
\textsuperscript{35} Id. at 24.
\textsuperscript{36} Id. at 26.
individuals developing within families necessitated an autonomous family that could adjust to the needs of its unique individuals.

Evolving areas of knowledge, such as psychology and child development, supported the theory of autonomous families being necessary and natural. Theories of child-rearing focused more on tolerance and recognition of the individual qualities of each child. "The parent was to use his authority and knowledge to balance what seemed essential in his world against what was novel and viable in the new world of the child. There were no absolute answers; every child was a gamble." 3 William J. Shearer, a leading nineteenth-century authority on children, advised parents to "make out of each [child] what the Almighty evidently intended him to be. What He intended is not always an easy matter to determine. The only way it can be determined is by carefully studying the peculiarities of each mind, heart and body with which every child is gifted." 38 Such emphasis on the individual characteristics of each child, coupled with the increasing isolation of the family, implies that the parents were in a unique position to determine what was appropriate for each of their children, and those decisions could not be questioned by external authority.

Interestingly, both the colonial family, with its community connections, and the increasingly isolated nineteenth-century family were viewed as serving the essential purpose of developing good citizens who were prepared to lead productive lives in the greater society. Perhaps what changed the most was not the perceived purpose of the family, but the perceptions about how that purpose could best be realized. Society was increasingly characterized as a voluntary association of autonomous individuals, where the role of the family was to nurture and protect happy, independent individuals who ultimately would be fulfilled by their freely chosen alliance with the larger society.

The patriarchal colonial society certainly protected parental authority, but it did so in a context of stronger ties between each family and the larger society. The more individualistic society of the nineteenth century also protected parental authority, but in the context of individual rights and decisions, autonomous families, suspicion about any kind of state involvement, and laissez-faire economic policies. Led by the parents, each family could theoretically assess what actions would best advance the interests of its unique individuals.

38. Id. at 122 (quoting William J. Shearer, The Management and Training of Children 269 (1898)).
Courts in the late nineteenth and early twentieth centuries had to respond to four major social developments: (1) the increased separation of family and public spheres of life; (2) the family as an entity whose main purpose was to provide fulfillment and happiness for individuals within the family; (3) the emergence of the idealized rugged individual who fashioned his own life, followed his own conscience, and pursued his own interests; and (4) the organization of child welfare efforts that recognized children as individuals having some minimum level of "rights." If individuals were too busy pursuing their own interests to intervene in the affairs of other families, and prevailing wisdom precluded state intervention, parental decisions would be challenged only if an important state interest was contravened.

Gradually, a body of judicial opinions developed which solidified these presumptions about family autonomy, protection of parental authority, and state intervention limited to protection of clearly defined and vital societal interests.

3. The Twentieth-Century Family

The twentieth century brought with it the notion of companionate marriage as well as the growing acceptance of the practice of divorce, and greater economic dependence by family members on sources outside of the family. This led to what has been called "the new family." Mary Ann Glendon described it as follows:

The "new family" is a convenient way of referring to that group of changes that characterizes 20th century Western marriage and family behavior, such as increasing fluidity, detachability and interchangeability of family relationships; the increasing appearance, or at least visibility, of family behavior outside formal legal categories; and to changing attitudes and behavior patterns in authority structure and economic relations within the family. It follows from these changes that the new family is not family in the sense of a single model that can be called typical for modern industrialized societies. The new family is a concept that represents a variety of co-existing family types. 39

The social and economic changes within the "new family" combined with social and economic changes in child maltreatment policy to produce a new perspective on family intervention.

Judith Areen pointed out two significant developments that occurred early in the twentieth century. The first was a series of changes in the poor relief system which, by granting benefits, enabled the poor to keep and

39. Glendon, supra note 1, at 3-4 (emphasis in original).
support their children. The second was state acceptance of a protective role in the emotional, as well as the physical, well-being of children.

The changes in the relief system made parental poverty a defense to, rather than a basis for, a finding that a child was neglected. Although this seemingly represented progress away from moralizing and towards helping children, there was a lingering aura of disapproval associated with official interventions into the parent-child relationship. "Still dominant was the notion that much poverty stemmed from the immorality of the poor. Mothers' pension programs would not, for instance, support children born out of wedlock nor, in many cases, even the deserted family."

Federal income supports for families with children were introduced by the Social Security Act in 1935. These supports, which theoretically prevent removal of poor children from their families for lack of adequate resources, were awarded with traditional values in mind:

Because the grants-in-aid funding scheme allowed states considerable discretion in establishing eligibility criteria, many children were in fact denied aid to dependent children because their mothers failed to meet the "suitable home" criteria established locally. In general, mothers were declared ineligible for assistance if they were considered immoral, that is, if they were living with men they were not married to or if they had out-of-wedlock children; housekeeping standards could also be criticized and used as a criterion to disqualify families from relief.

The public welfare system thus incorporated old mores and discouraged many of the poorest families from applying for assistance.

The second major change identified by Areen was the expansion of the state's protective role towards children to include the possibility of intervention in cases of emotional harm. "Often this change was accompanied by a revision of statutes that made parental immorality a basis for state interven-

41. Id. at 910-11.
42. Id. at 911.
tion. In New York, for example, impairment of emotional health and impairment of mental or emotional condition were made grounds for intervention in 1970, while lack of moral supervision was eliminated. Theoretically, this was an enlargement of state protective powers on behalf of children. However, it actually reduced the likelihood of state intervention because externally visible parental behavior no longer justified child-removal; proof of actual emotional or physical harm became necessary.

This acceptance of a legal and societal obligation to protect the emotional health and development of children complicated the task of defining the limits of individual privacy and family autonomy. In many cases, identification of significant emotional damage to a child requires closer scrutiny of family operations than the more visible effects of physical cruelty and poverty.

The factors discussed above contributed to the evolution of a different and far more autonomous type of "new family." This new family was increasingly recognized in a growing body of jurisprudence that recognized parental rights such as privacy and authority as essential instruments of an orderly society, as well as individually held rights being balanced with the "rights" of society. In effect, the courts recognized that both society and parents had important and protectable interests in how children were raised. Although the well-being of children was certainly a consideration, the concept of "children's rights" did not develop until much later, and arguably has not yet fully evolved.

II. THE COURTS: SACRIFICING CHILD PROTECTION TO FAMILY AUTONOMY INTERESTS

One way to interpret American cases dealing with family autonomy issues is to say that courts will, whenever possible, defer to parental authority and preserve the privacy that has come to be expected by families. In a line of cases which addressed the allocation of power between parents and the state to direct children's upbringing, the Supreme Court defended parental authority and allowed the state to supplant it only where an important and clearly relevant governmental or societal interest was at stake.

In 1923, the Supreme Court in *Meyer v. Nebraska* reversed the conviction of a parochial school teacher who taught German language materials to an elementary school child in contravention of a Nebraska statute which

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47. *Glendon, supra* note 1, at 3-4; *see generally Grossberg, supra* note 13, at 3-30 (concept of "the republican family").
48. 262 U.S. 390 (1923).
forbade the teaching of foreign languages to children until they had graduated from the eighth grade. The Court recognized the legitimate power of the State to compel school attendance and to establish minimum curricular requirements. However, the Court found no compelling state interest in preventing foreign language instruction sufficient to overshadow the Fourteenth Amendment rights of the teacher to teach and of parents to hire him to teach German to their children.\textsuperscript{49} While the State is empowered to require education of children, the Court refused to extend this power to a standardized program required in every instance, where the parents have other compelling concerns.\textsuperscript{50}

Similarly, in the 1925 case \textit{Pierce v. Society of Sisters},\textsuperscript{51} the Court struck down an Oregon statute which required parents and guardians of children between the ages of eight and sixteen to send those children to public school. This statute effectively precluded parents from electing to send their children to private schools. Although the Court again recognized the State's legitimate power to regulate schools and to require school attendance, it found that the Oregon law "unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control."\textsuperscript{52} The Court added:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.\textsuperscript{53}

In 1944, the Court invoked the doctrine of \textit{parens patriae} to uphold a state child labor law under which a mother was convicted. \textit{Prince v. Massachusetts}\textsuperscript{54} involved a nine year-old girl who distributed religious tracts and the consequent conviction of her mother for violation of State child labor laws. The Court justified the State's override of this parental decision as necessary to protect the child and to further the state interest in the child's well-being. The Court reasoned that "a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into

\textsuperscript{49} Id. at 400, 402.
\textsuperscript{50} See Wisconsin v. Yoder, 406 U.S. 205 (1972); \textit{Meyer}, 262 U.S. 390 (discussing antiforeign language laws).
\textsuperscript{51} 268 U.S. 510 (1925).
\textsuperscript{52} Id. at 534-35.
\textsuperscript{53} Id. at 535.
\textsuperscript{54} Prince v. Massachusetts, 321 U.S. 158, 166-71 (1944).
full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.\textsuperscript{55}

The Court applied the \textit{Prince} holding to the 1972 case \textit{Wisconsin v. Yoder}.\textsuperscript{56} The State argued, \textit{inter alia}, that Amish children had a right to a secondary education regardless of the wishes of their parents, and the State had the power to enforce this right. The Court nonetheless refused to supersede the decision of Amish parents to remove their children from school two years before they would complete the State's compulsory education term. Despite the argument that it was not the best choice for the children involved, the Court refused to override the parental choice, stating that:

To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under \textit{Prince} if it appears that parental decisions will jeopardize the health or safety of the child, or have potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claim in terms of the welfare of the child and society as a whole.\textsuperscript{57} The Court also refused to find that the Amish form of education for children over the age of fourteen would handicap them later should they decide eventually to leave the Amish community.\textsuperscript{58}

In the preceding cases, the Supreme Court reasoned that parental authority must be protected and usurped only in extreme cases. However, this reasoning has been challenged in cases questioning specific implementations of parental authority over children. The state has frequently attempted to override parental decisions concerning the administration of health care to children. Although these cases are most likely brought in state court, the decisions mirror the deference to parental choices found in federal decisions.

In general, a parental decision against medical treatment of a child, even when it is based on the parent's religious beliefs, will be overturned where the child's life is in immediate danger.\textsuperscript{59} The Supreme Court also recognized other compelling state interests that justify overriding parental decisions. For instance, the state's interest in public health has long been held to justify mandatory vaccinations of children, regardless of parental objections.\textsuperscript{60}

\textsuperscript{55} Id. at 168.
\textsuperscript{56} 406 U.S. 205 (1972).
\textsuperscript{57} Id. at 233-34 (italics in original).
\textsuperscript{58} Id. at 224-25.
\textsuperscript{60} Jacobson v. Massachusetts, 197 U.S. 11, 37-38 (1905).
Areas deemed acceptable for state intervention are narrowly delineated, and any gray areas are left to the discretion of the parents. Although courts sometimes intervene to supplant decisions, the opinions make it clear that this is viewed as an unfortunate and limited incursion into the sacred realm of family life. For example, in *Prince v. Massachusetts,*\(^{61}\) the Court upheld the state statute protecting the child but the decision was accompanied by the following language:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom includes preparation for obligations the state can neither supply nor hinder. . . . [but] neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.\(^{62}\)

Similarly, in *Society of Sisters,* the Court emphasized that “rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.”\(^{63}\)

Where parental behavior produces uncertain harm, or “mere” risk, the benefit of the doubt may well be given to the parent whose judgment will stand. For example, in *In re Phillip B.*,\(^ {64}\) California challenged the refusal of parents to consent to cardiac surgery on their twelve year-old son who also suffered from Down’s Syndrome. The parents’ decision was allowed to stand as a reasonable conclusion after balancing the possible benefits against the risks of the operation.\(^ {65}\) Doctors had advised that failure to operate would lead to a deterioration in Phillip’s quality of life and could eventually cause his death. He was not, however, in *immediate* danger of death if the operation was not performed.\(^ {66}\)

Four years later this result was changed by a decision that awarded guardianship of Phillip to a couple who consented to the operation. Even in such an unusual case, the court refused to characterize the parents’ behavior as neglectful or otherwise improper:

> In reaching our decision . . . , we neither suggest nor imply that appellants’ subjectively motivated custodial objectives affront conventional norms of parental fitness; rather, we determine only that on the unusual factual record before us, the challenged order of

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62. *Id.* at 166 (italics in original) (citation omitted) (footnotes omitted).
63. *Society of Sisters,* 268 U.S. at 535.
65. *Id.* at 50.
66. *Id.*
guardianship must be upheld in order to avert potential harm to the minor ward likely to result from appellants’ continuing custody and to subserve his best interests.\textsuperscript{67}

This is just one example of the extreme deference the law accords to parental decisions, as well as the tendency of the law to assume that parents act from good motives with respect to their children.

III. UNDERLYING ASSUMPTIONS

Favoritism towards parental decisions and authority over children is typically justified as preserving family autonomy and freedom from state interference in private relationships. It is juxtaposed against a perception of the state as Big Brother, dictating questionable morals to children who have no respect for their elders, religion, or traditional values. Indeed, the refusal of the state to second-guess parental action or inaction is characterized as a policy of nonintervention. The law in its various manifestations does not directly assert that some children are beyond its reach and will be sacrificed to preserve privacy in family relations in this country. Rather, privacy is represented as in the best interests of all children because certain assumptions are made about its overall effects.

There are at least two presumptions underlying the American philosophy of family autonomy. The first presumption is that privacy strengthens families. Because families are seen as the building blocks of society, privacy must be good for families, for the children who live in families, and for society. The second presumption is that parents can be trusted to identify and to consistently act to advance the best interests of their children. However, these presumptions are at best questionable, especially in families where child maltreatment occurs.

A. The Presumption That Privacy Strengthens Families

1. The Perceived Advantages of Family Autonomy

Dicta in cases concerned with family autonomy and parental rights usually focuses on what is characterized as the parental right to raise a child in the way the parent feels is most appropriate.\textsuperscript{68} The language of the decisions does not acknowledge the principle that stronger parents yield stronger families. However, this reasoning is consistent with the fear that state intervention will interfere with “the parent’s claim to authority in her own household and in the rearing of her children” which is "a sacred pri-

\textsuperscript{67} Guardianship of Phillip B., 188 Cal. Rptr. 781, 784 (Ct. App. 1983).

\textsuperscript{68} See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944).
vate interest, basic in a democracy.” In *Pierce v. Society of Sisters*, the Court refers to “the liberty of parents and guardians to direct the upbringing and education of children under their control.” This reflects the previously discussed opinion of the Court in *Prince v. Massachusetts*.

As previously shown, parental authority was upheld to assure the production of good citizens in the eighteenth century. With the subsequent evolution of the autonomous individual and the new family, parental authority was upheld as part of the privacy properly accorded to an individual within one's own home.

A variety of values and good intentions have motivated increased societal protection of family autonomy. For instance, society has increasingly valued individualism. Reinforcement of parental authority and respect for unique parental choices assures that appropriately individualized treatment can be devised by individual parents to meet the needs of each unique child. Allowing parents to make unquestioned decisions about child-rearing also enables parents to retain the traditions of their forefathers, while encouraging a more culturally diverse society.

The preservation of family autonomy is partially motivated by the hope of avoiding harms which could result from legal or societal intervention into the family. Humanitarian impulses, as well as damaging results from well-intentioned policies of family intervention, have gradually led policymakers to question whether intervention sometimes causes as much, if not more, damage as allowing the status quo to continue in a maltreating family.

The fear that infringement upon family privacy will damage the family and impair the happiness and individual development of family members may be the chief reason that family autonomy continues to be so revered. Current experts have described child maltreatment as a complex dynamic that reflects the interaction of many factors other than parental behaviors and attitudes. If child maltreatment is a complex process requiring a multivariate analysis, it stands to reason that state intervention could destroy

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70. 268 U.S. 510, 534-35 (1925).
71. See *Prince*, 321 U.S. 158 (*Prince* upheld convictions for child labor law violations on the ground that even parental authority and family privacy did not preclude the state from intervening to protect children from certain sorts of harms).
72. See supra text accompanying notes 13-27.
73. Parental authority was upheld where the individual lived in a conventional family.
74. These well-intentioned policies include orphanages, some versions of foster care where stability was undermined, and the juvenile court system in general.
75. See, e.g., the works of James Garbarino and other advocates of the ecological approach to child maltreatment.
the delicate balance existing in a parent-child relationship. Destroying these valuable parent-child bonds may further endanger a child's well-being. This argument is supported by the fact that even severely maltreated children usually demonstrate some attachment to their parents and may be traumatized by separation from their parents.

The attachment of children to parents who, by all ordinary standards, are very bad is a never-ceasing source of wonder to those who seek to help them. Even when they are with kindly foster-parents these children feel their roots to be in the homes where, perhaps, they have been neglected and ill-tended, and keenly resent criticisms directed against their parents. Efforts made to "save" a child from his bad surroundings and to give him new standards are commonly of no avail, since it is his own parents who, for good or ill, he values and with whom he is identified.76

There is also concern that state intervention itself is stressful and traumatic, and may cause a fragile family to collapse where it might have functioned in the absence of state interference.

In an influential series of works,77 Goldstein, Freud, and Solnit argued that even in cases of child maltreatment, state intervention into families should be the exception rather than the rule because of government's inability to productively order interpersonal relationships.78

[Law] neither has the sensitivity nor the resources to maintain or supervise the ongoing day-to-day happenings between parent and child-and these are essential to meeting ever-changing demands and needs. Nor does it have the capacity to predict future events and needs, which would justify or make workable over the long run any specific conditions it might impose concerning, for example, education, visitation, health care, or religious upbringing. . . . The law, then, ought to and generally does prefer the private ordering of interpersonal relationships over state intrusions on them.79

76. John Bowlby, Child Care and the Growth of Love 80 (2d ed. 1965).
77. See Joseph Goldstein et al., Beyond the Best Interests of the Child (1973) [hereinafter Goldstein I]; Joseph Goldstein et al., Before the Best Interest of the Child (1979) [hereinafter Goldstein II]; Joseph Goldstein et al., In the Best Interests of the Child (1986) [hereinafter Goldstein III].
78. It is difficult to say whether Goldstein, Freud, and Solnit increased the ferocious protection of family autonomy and parental authority or merely described it. However, these authors have undoubtedly assumed the role of the nonintervention movement's "leading theoreticians." See Marsha Garrison, Child Welfare Decisionmaking: In Search of the Least Drastic Alternative, 75 Geo. L.J. 1745, 1762 (1987).
79. Goldstein I, supra note 77, at 50.
Much of this impassioned argument for family autonomy\textsuperscript{80} rested on the authors' insistence that such autonomy is essential to a child's healthy development. They theorized that children would suffer severe psychological harm from state intervention into the family partly because intervention would destroy a child's belief that his parents were infallible.\textsuperscript{81} Ultimately, they argued that child placement decisions should be guided by an attempt to provide "the least detrimental available alternative for safeguarding the child's growth and development."\textsuperscript{82} In the context of their theories, this usually means minimal state intervention.

Although the Goldstein, Freud, and Solnit theories have been influential, they have been criticized. As Marsha Garrison has pointed out, the authors presented no concrete evidence for their claims.\textsuperscript{83} This failure to support their conclusions may be due to a lack of specific supporting evidence:

Experts have at times questioned the efficacy of intervention with a noncooperative parent or the impact of intervention on a parent's self-image, but no expert has suggested that intervention is harmful because it damages a child's belief in his parents' omniscience.

Nor does common sense support Goldstein, Freud, and Solnit's view. Parents are not, in fact, omniscient or all-powerful, and evidence of this reality is available daily from a variety of sources. It is thus quite unlikely that intervention by child welfare authorities would provide the first evidence of parental limitations. Additionally, only very young children are likely to maintain such beliefs, and the ability of these young children to comprehend that the authorities pose a challenge to parental authority seems doubtful. Given these facts, it is not surprising that studies of intervention have only rarely reported negative effects.\textsuperscript{84}

\textsuperscript{80} Actually, they use the term "'family integrity' rather than 'family autonomy' to encompass the three liberty interests of direct concern to children (parental autonomy, the right to autonomous parents, and privacy). . . ." \textit{GOLDSTEIN II}, \textit{supra} note 77, at 9. However, this article will continue to refer to privacy, family autonomy, and parental authority.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{GOLDSTEIN I, supra} note 77, at 53.

\textsuperscript{83} \textit{See generally} Garrison, \textit{supra} note 78 (critiquing the Goldstein, Freud, and Solnit theories in their first two works. The opening paragraph of her critique indicates its general thrust: "Rigorous analysis has not typically been employed by the drafters of standards implementing the least drastic alternative. Indeed, the reform movement's leading theoreticians, Joseph Goldstein, Anna Freud, and Albert Solnit, provide an excellent example of cavalier and over-optimistic analysis." \textit{Id. at 1762.}).

\textsuperscript{84} \textit{Id.} at 1787 (citations omitted).
2. Family Autonomy, Nonintervention, and Isolation

The positive value attributed to family privacy by the preceding theories presumes that any contacts initiated by the public sphere into the private will be potentially damaging. "Family autonomy" and "privacy," as used here, imply a policy of state non-intervention. Yet, as pointed out by Frances Olsen, the concept of state nonintervention is meaningless in this context. By virtue of its existence as a source of norms and rules of law, the state intervenes in individual families whether actively or passively. In other words, state inaction affects the family just as significantly as state action. A refusal to take specific action in a particular family conflict is essentially the preservation of the status quo. "Nonintervention" in cases of possible child maltreatment perpetuates unquestioned parental authority and preserves the traditional balance of power between parents, who traditionally have power, and minor children, who traditionally lack power.

Thus, a decision against interference in a family is composed of numerous policy decisions: what constitutes a family; what the distribution of power should be in the family, because state nonaction reinforces existing parental authority; and the assignment of tasks and roles within the family. "Neither 'intervention' nor 'nonintervention' is an accurate description of any particular set of policies, and the terms obscure rather than clarify the policy choices that society makes." In addition to reinforcing traditional power structures and role assignments, insulation from outside monitoring and support can be fairly characterized as isolation. There is a fine line between autonomy, which implies independence from outside meddling and destructive interference, and isolation, which implies a lack of social supports and a lack of accountability to community norms for behavior.

Isolation from the community has been shown to have a negative impact on families. One factor often identified in maltreating families is social isolation and lack of community support. Steele and Pollock, pioneers in the study of child maltreatment, concluded that, in general, "the abusing parent tends to lead a life which is described as alienated, asocial, or iso-

86. Id. at 837.
87. Id.
88. Of course, Olsen would likely claim that community norms are being observed; we just are not admitting what those norms encompass.
lated.” The authors attribute this isolation to a lack of basic trust of other people and a fear that the environment will not adequately respond to meet the needs of the abusing parent. This attitude often stems from the parent’s own early caretakers who were not appropriately responsive to his or her needs. After describing some of the manifestations of this lack of confidence and resulting isolation, Steele and Pollock added: “We have jokingly remarked that if one goes down the street and sees a house with the blinds drawn in broad daylight, with two unrepaired cars in the driveway, and finds the people have an unlisted phone number, the chances are high that the inhabitants abuse their children.”

Steele and Pollock’s theories tend to focus on the “psychodynamic” approach and characterize child maltreatment as largely a function of parental personality development, or lack thereof. However, the “ecological” perspective, another approach to the study of child maltreatment, also supports the theory that isolation and inadequate social supports are related to child maltreatment. This approach studies child maltreatment from a more global perspective and considers the interaction of personal attributes, such as physical condition, age, personality, and family history, with environmental conditions, such as poverty, societal attitudes, poor educational opportunities, substandard housing conditions, and unemployment.

James Garbarino, a leading proponent of the ecological approach, once theorized that abuse results from the interaction between excessive privacy and other conditions: social or economic stress; unstable patterns of parenting; and some intrinsic characteristic of the child which makes him or her a stimulus for the abusive parental behavior. This last element is not meant to “blame the victim,” and is described by Garbarino as follows:

This may be due to something intrinsic to the child—such as an overly active and nonresponsive temperament—or it may be due to something extrinsic to the child—such as its resemblance to a hated person, its ordinal position, or its relationship to someone resented by the caregiver.

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90. “[A]busive parents were over seven times more likely to have unlisted phone numbers than nonabusive parents.” Edward Zigler & Nancy W. Hall, *Physical Child Abuse in America: Past, Present and Future*, in *CHILD MALTREATMENT* 38, 61 (Dante Cicchetti & Vicki Carlson eds., 1989) (citations omitted).

91. Steele & Pollock, *supra* note 89, at 120.


93. *Id.* at 572.
In a later book, *Understanding Abusive Families*, Garbarino and co-author Gwen Gilliam described child maltreatment as partly a product of a culture that tolerates and even encourages the use of force against children. This society regards children as the rightful property of their parents, who can treat their children in any manner they feel is appropriate. The authors argued that an equally important condition necessary for child abuse "is isolation of the parent-child relationship from potent prosocial support systems." They explained that "[t]his factor pertains to the relation of the family system or victim perpetrator dyad to the community."

There are many studies that claim there is a connection between social isolation and serious parenting problems. For example, adequate social support often correlates to lower reports of depression by mothers. Depressed mothers frequently have parenting difficulties, which may stem from the emotional withdrawal characteristic of depression.

The quality of a parent's marital relationship plays a vital role in overall psychological well-being and parental competence. The adequacy of other interpersonal relationships also affects parents' self-esteem and feelings of competence, and therefore, at least, indirectly influences parental competence. Lack of continuing extra-familial relationships as well as lack of participation in cooperative neighborhood activities, such as child care, have also been shown to be correlates of abuse.

In one analysis, Belsky and Vondra cite a number of studies supporting the thesis that good parenting is associated with adequate social supports, while child maltreatment is associated with parental social isolation. For example, Powell found that mothers who had at least weekly contact with friends exhibited more verbal and emotional responsivity towards their preschool children. Similarly, Abernathy found that a parental sense of competence in caretaking abilities, including an appreciation of the unique
needs and abilities of each child, was positively associated with parental participation in a tightly-knit social network.\textsuperscript{104}

It should be noted, however, that there can be too much of a good thing, even with respect to social supports. Extreme amounts of social contact may actually be detrimental to parenting functions.\textsuperscript{105} It appears not to be social contacts per se that enhance parental functioning, but contacts that improve the parents’ own psychological well-being.\textsuperscript{106}

At least one other argument holds that the reverence traditionally accorded to family autonomy is neither in the best interests of families nor of their individual members. If strict privacy is observed, family relations are essentially exempt from observance of the social principles of justice and moral treatment of individuals and there are no societal consequences if these standards are not observed. As Susan Moller Okin points out in her book \textit{Justice, Gender, and the Family}, theories of justice that presume that individuals will act with empathy and fairness towards one another ignore the fact that the adult individuals capable of acting in this manner must learn to do so in their families.\textsuperscript{107} Removal of families from reasonable social contacts and supports could jeopardize their children’s moral development and prove detrimental to society at large.

\textbf{B. The Presumption That Parents Can Be Counted Upon to Consistently Act in the Best Interests of Their Children}

Closely related to the presumption that privacy is best for children and families is the presumption that parents will consistently act in the best interests of their children. When considered together, the two presumptions represent the belief that if we simply leave families alone, parents will work everything out for the best. These ideas are related to a long tradition of parenting that is understood as instinctive in the sense that the proper exercise of parental authority comes naturally. This belief that parenting comes naturally is not only wrong, it endangers the welfare of children by preventing necessary interventions.

The presumption that parents will usually act in the best interests of their children is deeply ingrained, but not always acknowledged, in legal writing and the philosophical theories that influence it. One unusually clear

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\textsuperscript{105} Id. at 97, 179-80.

\textsuperscript{106} Id. at 180 (citing M. Cochran & J. Brassard, \textit{Child Development and Personal Social Networks, in Child Development} 41 (1978); N.D. Colletta et al., The Impact of Support for Adolescent Mothers (unpublished manuscript)).

\end{footnotesize}
acknowledgement of this belief is found in Parham v. J.R.,\textsuperscript{108} which examined due process requirements for the involuntary commitment of a child to a mental institution by his parents:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.\textsuperscript{109}

The Court cited James Kent, whose Commentaries on American Law stated: "The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of universal law."\textsuperscript{110} Kent also opined that "[t]he obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws."\textsuperscript{111} Similarly, Blackstone noted that Providence had enforced parental duties more effectively than could laws "by implanting in the breast of every parent that natural ... or insuperable degree of affection, which not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish."\textsuperscript{112}

In On the Duty of Man and Citizen According to Natural Law,\textsuperscript{113} Samuel Pufendorf attributed parental authority over children to two causes, the tacit consent of the child and the caring for children which is imposed on parents by natural law:

To prevent negligence, nature has implanted in parents a most tender affection for [children]. Exercise of that care requires the power ... to direct the children's actions for their own security, which they do not yet discern for themselves since, they lack judgement. ... In practice parents' authority over children is established when they acknowledge them, feed them and undertake to shape them into good members of human society.\textsuperscript{114}

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\footnotetext[108]{442 U.S. 584 (1979).}
\footnotetext[109]{Id. at 602 (citations omitted).}
\footnotetext[110]{James Kent, Commentaries on American Law 189-205 (11th ed. 1867), reprinted in Children and Youth, supra note 20, at 363.}
\footnotetext[111]{Id.}
\footnotetext[113]{Samuel Pufendorf, On the Duty of Man and Citizen According to Natural Law (1991).}
\footnotetext[114]{Pufendorf, supra note 113, at 124.}
\end{footnotes}
This same legal and philosophical tradition often treats evidence that parents do not always act in the best interests of their children as an aberration which should not induce a change in social policy:

As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their child"... creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.\textsuperscript{115}

Thus, the belief that good parenting skills will naturally evolve if family privacy is respected is deeply ingrained in our legal tradition.

The presumption that appropriate parenting occurs naturally and reliably persists despite the fact that there is abundant evidence that this behavior is not instinctual. Even if we accept the premise that parenting "comes naturally," intervening factors such as adverse early life experiences or extreme stress can inhibit or destroy appropriate parenting behaviors.

Early clinical studies of physically abusive parents drew attention to the high proportion who had suffered severely deviant parenting in their own upbringing... There are a variety of problems in these early studies... Nevertheless, better controlled studies have tended to confirm the association between severe parenting problems and the experience of serious childhood adversities.\textsuperscript{116}

Although intervening factors affecting parenting ability are only partially understood, they seem to interact in an extraordinarily complex way. This is illustrated by the comments of one researcher:

[W]e found that the greater the overall burden of poor parenting experienced, the greater the risk of poor parenting provided to the next generation of children. It was striking, also, how one adversity tended to lead to another. Thus, parental deviance probably constituted a genetic risk factor of some importance for some outcomes. However, this (possibly) genetic factor also established an environmental risk because the parental deficiencies tended to create a hostile, discordant family environment leading to disrupted parenting and then admission to an institution. The institutional rearing car-

\textsuperscript{115} Parham, 442 U.S. at 602-03 (emphasis in original).

\textsuperscript{116} Michael Rutter, Intergenerational Continuities and Discontinuities in Serious Parenting Difficulties, in CHILD MALTREATMENT 317, 323 (Dante Cicchetti & Vicki Carlson eds., 1989) (citations omitted).
ried its own risks, probably as a consequence of the lack of continuous stable parenting (a risk that was possibly much intensified for these children because of their genetic vulnerabilities and because of their early experiences of disrupted parenting). 117

It is encouraging to note that, just as bad experiences jeopardize the development of good parenting behaviors, positive, nurturing experiences can encourage the development of good parenting, even in people who have a history of damaging influences:

There is very little that is unalterable even with respect to the sequela of severe and prolonged maltreatment in childhood. Good experiences as late as early adult life can make an important difference in outcome. However, it would be misleading to see such experiences as a matter of chance or good luck. In part, later experiences arise as a result of earlier circumstances, but also individuals can do much to shape their lives, and it is the possibility of this positive action to break cycles of transmitted deprivation that provides the opportunity for preventive and therapeutic interventions. 118

Current adverse conditions also affect parenting behaviors. Studies show that extreme stress, whether physical, emotional, economic, or cultural, on a parent can make him or her operate in a basic survival mode. If there is only a limited amount of energy, it may be used simply for survival and the parent may not have the emotional resources left to meet the needs of the children. “[I]n most such [neglecting] parents the psychic energy ordinarily available for investment in child caring has been dissipated. The instinct to parent has become distorted in its aim or overwhelmed by problems of personal survival as a result of massive early deprivations.” 119

Moreover, the combination of deficient early experiences and currently overwhelming circumstances can further jeopardize the development of positive parenting behaviors. The effects of early deprivation, whether material or emotional, will in turn make parents more vulnerable to current deprivations. “Socially impoverished families may be particularly vulnerable to socially impoverished environments and susceptible to amelioration only in socially rich environments.” 120 Good parenting appears to be a product of many factors, such as individual temperament, learned behavior,

117. Id. at 339.
118. Id. at 344.
120. Id. at 26 (citation omitted).
and quality of the current environment. There is nothing automatic about it.121

These conclusions are supported by statistics on child maltreatment in this country, as well as anecdotal reports from the disciplines of social work, law, medicine, and psychology, which demonstrate that a significant number of parents and parent substitutes maltreat children each year.122 It is apparent that although parents may be in the best position to assess and act to further their children's best interests, there are no guarantees they will actually do either. As a result, it may be overstating the case to claim that parents act in the best interests of their children. Parents may act in what they perceive to be the best interests of their children. However, depending on their knowledge, experience, social supports, and environment, parents may not be able to accurately assess the best interests of their children.

Finally, it should be noted that in certain circumstances, parents and children may even have recognizable conflicts of interest. This may seem like an odd idea, but the law already recognizes and attempts to balance these types of conflicts. For example, it may be in the best interests of the parents to have the children quit school and generate income for the support of the family. However, mandatory school attendance laws and restrictions on child labor prevent this behavior.

IV. THE PROPER ROLE OF LAW: PROVIDING STRUCTURES TO MEET CHILDREN'S NEEDS

While newspapers focus on the dramatic cases of child abuse, we are surrounded on a day-to-day basis with the more mundane incidents of violence against children. An infant is dropped repeatedly. A toddler is whipped. A 3-year-old is bruised. A kindergartner is punched. A teenager is regularly assaulted by a parent for minor misbehavior. These events rarely, if ever, reach the newspapers but they are at the core of the problem. . . . [C]hildren are treated as if they were the exclusive domain of parents, not future citizens, not part of the larger society. How do we as a society allow child abuse?

121. Feminist scholarship has been especially critical of assumptions that parenting comes naturally. Such claims set up parents (particularly mothers) for failure, since they assume a natural aptitude for the superhuman task which parenting has become due to increased modern expectations. These unrealistic standards also increase the stigma associated with seeking help for parenting difficulties. Cf. SYLVIA A. HEWLETT, A LESSER LIFE (1986).

122. It is impossible to tell whether incidents of maltreatment or only the reports are increasing, but there is no doubt that the phenomenon of child maltreatment is significantly present in this society.
We allow it by permitting value on privacy to be misused as a justification for social isolation.\textsuperscript{123}

Although it is easier to point out problems than to propose solutions, many approaches to the problem of child maltreatment have been suggested. However, it sometimes seems that maltreated children, like the poor, shall always be with us.

Currently, much of the law's response to child maltreatment is not to prevent or identify risks, ostensibly out of deference to family autonomy and cultural diversity. Rather, the law chooses to roar in, remove the children, and attempt to completely run family affairs when maltreatment has been "identified." This all-or-nothing approach leaves too much to chance and increases the stigma attached to those needing help.

Family autonomy and individual privacy are definitely valuable in this society. Nonetheless, their protection should not mean that children must be stuck with the luck of the draw in having their needs fulfilled. Nor should the fact that we do not know everything about child development and children's needs prevent us as a society from requiring that all children have access to certain developmentally positive resources. There is a real possibility that outside supports could counteract many of the harmful influences of deficiencies within the family.

Specifically, many social reforms could be implemented to make resources more readily available to families that need them without the attached stigma. Classes in parenting and child development could be required in middle schools or even elementary schools. Quality day care choices available at reasonable cost could reduce the stresses associated with overworked, overburdened parents who must scramble to find even low-quality child care. Crisis nurseries, for infants and older children, would give parents a safety valve when things begin to get out of control. Parent support groups could provide useful information and needed social contacts. Reasonably priced and available mental health and counseling services would enable people to seek help before things become intolerable. Smaller class sizes would give all teachers greater opportunity to meet the individual needs of their students. Addressing issues of poverty and unemployment could reduce some of the major stresses which have been tied to child maltreatment. In fact, many of these programs and other family-enabling interventions have been implemented in some communities, and have shown promising results.\textsuperscript{124}

\textsuperscript{123} Garbarino, \textit{supra} note 92, at 572.
\textsuperscript{124} \textit{See generally} Lisbeth B. Schorr, \textit{Within Our Reach: Breaking the Cycle of Disadvantage} (1988).
Evidence that parenting is not instinctual and that isolation exacerbates problems in the parent-child relationship may not seem sufficient to support an argument for some sort of official legal or societal intervention. To some, this suggestion may seem tantamount to a totalitarian society. The kinds of intervention suggested, however, call for social support and involvement rather than intrusion. Not every contact from outside the family is a violation of privacy.

Families have always relied on some outside sources of support, such as the church or kinship bonds. Social and economic forces, some of which have been discussed in this article, have rendered families less capable of meeting the needs of all their members. At the same time, ties to traditional sources of support have become more attenuated. Often by default, the welfare state has stepped in to fill the gap. Other structured organizations could step in as well.

Some have claimed that offering individualized and voluntary social service assistance to maltreating families is the only feasible solution. Certainly, voluntary assistance is an essential part of any policy designed to reduce child maltreatment and strengthen families. However, the exclusive focus on voluntary assistance does not acknowledge two important factors. First, a hallmark of many dysfunctional families is the denial of the need for help. Second, in many actual situations it is difficult to distinguish between help which is accepted voluntarily and help which is coercively imposed. Some parents "voluntarily" accept help because of the threat of what will happen to them if they do not. A better legal alternative may be to require family and community support programs such as mandatory education, or guaranteed financial and social supports to parents and their minor children.

CONCLUSION

In this article, I have tried to show that much of the law's reverence for parental privacy and family autonomy is based on false premises. We need to scrutinize these and other long-held social beliefs about what is proper in a family, and stop using unexamined platitudes as rationalizations for ignoring the developmental needs of children. We have hidden behind the excuse of family autonomy for too long. True autonomy requires strength, and strong families need to be supported by law. While championing privacy and autonomy, we have, in reality, imposed and reinforced social isolation. The law must attempt to reverse this trend.

125. See generally GLENDON, supra note 1.